Supreme Ct., U.S.
FILED
OCT 7 1994
OFFICE OF THE CLERK

No. 94-42

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROSS MIDDLEMIST, *et al.*,
Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, BRUCE BABBITT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR LAKE COUNTY, MONTANA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

LARRY NISTLER
Lake County Attorney
106 4th Avenue East
Polson, Montana 59860
(406) 883-6211

TOM D. TOBIN *
TOBIN LAW OFFICES, P.C.
P.O. Box 730
422 Main Street
Winner, South Dakota 57580-0730
(605) 842-2500

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. *NATIONAL FARMERS UNION* AND *IOWA MUTUAL* HAVE NO APPLICATION IN THE ABSENCE OF LITIGATION PENDING IN TRIBAL COURT	4
II. THE VIEWS OF THE UNITED STATES SHOULD BE ASSESSED IN THE LIGHT OF THEIR PREVIOUS ARGUMENTS	7
CONCLUSION	13
APPENDIX	
Act of April 23, 1904 (33 Stat. 302)	1a

TABLE OF AUTHORITIES

CASES: Page

Alabama Pub. Serv. Comm'n v. Southern R.R. Co., 341 U.S. 341 (1951) 5
Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993) 6
Blaze Construction Inc. v. U.S., 27 Fed. Cl. 646 (1993) 11, 12
Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) ..10, 11, 13
Brown v. Washoe Housing Authority, 835 F.2d 1327 (10th Cir. 1988) 12
Burlington Northern Railroad Co. v. Crow Tribal Council, 940 F.2d 1239 (9th Cir. 1991) 12
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 5, 6
Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982) 12
County of Yakima, et al. v. Confederated Tribes and Bands of the Yakima Indian Nation, —— U.S. ——, 112 S.Ct. 683 (1992) 11
Duro v. Reina, 495 U.S. 676 (1990) 9, 10, 11
Duncan Energy Co. v. The Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994) 4, 6, 11
Hagen v. Utah, —— U.S. ——, 114 S.Ct. 958 (1994) 2, 12
Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9 (1987) .....*passim*
Juidice v. Vail, 430 U.S. 327 (1977) 4
Middlemist v. Secretary of the U.S. Dept. of Interior, 824 F.Supp. 940 (D. Mont. 1993) 4, 11
Middlemist v. Secretary of the U.S. Dept. of Interior, 19 F.2d 1318 (9th Cir. 1994), *petition for cert. filed* (U.S. July 5, 1994) (No. 94-42) 2
Montana v. United States, 450 U.S. 544 (1981) 9, 10
Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1 (1983) 5
National Farmers Union Insurance Company v. Crow Tribe of Indians, 471 U.S. 845 (1985) .....*passim*

TABLE OF AUTHORITIES—Continued

	Page
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	9
Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988)	12
Smith v. Moffett, 947 F.2d 442 (10th Cir. 1991)	12
Snowbird Construction Co., Inc. v. U.S., 666 F.Supp. 1437 (D. Idaho 1987)	12
South Dakota v. Bourland, —— U.S. ——, 113 S.Ct. 2309 (1993)	9, 10, 11, 13
Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221 (9th Cir. 1989)	12
Stock West Corp. v. Taylor, 737 F.Supp. 601 (D. Or. 1990)	12
Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992)	12
Texaco Inc. v. Zah, 5 F.3d 1374 (10th Cir. 1993)	6
Tom's Amusement Co., Inc. v. Cuthbertson, 816 F.Supp. 403 (W.D.N.C. 1993)	12
Twin City Construction Co. of Fargo v. Turtle Mountain Band of Chippewas, 866 F.2d 971 (8th Cir. 1989)	12
United States v. Cherokee Nation, 480 U.S. 700 (1987)	13
United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992)	8
Utah Div. of State Lands v. United States, 482 U.S. 193 (1987)	12-13
Ute Indian Tribe v. State of Utah, 716 F.2d 1298 (10th Cir. 1983), 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986)	12
Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987)	12
Younger v. Harris, 401 U.S. 38 (1971)	4
STATUTES:	
Act of April 23, 1904, 33 Stat. 302	1
Presidential Proclamation of May 22, 1909, 36 Stat. 2494	2

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

Brief for the United States, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546) 9

Brief for Federal Appellees, *Middlemist v. Secretary of the U.S. Dept. of Interior*, 19 F.3d 1318 (9th Cir. 1994) (No. 93-35315) 7, 11

Brief for the United States as *Amicus Curiae* Supporting Respondents, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (No. 85-1589) 4, 5, 7, 10

Brief for the United States, *Montana v. United States*, 450 U.S. 544 (1981) (No. 79-1128) 9

Brief for the United States as *Amicus Curiae* Supporting Respondents, *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (No. 84-320) 4, 7

Memorandum for the United States, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (No. 76-5729) 9

Brief for the United States, *South Dakota v. Bourland*, —— U.S. ——, 113 S.Ct. 2309 (1993) (No. 91-2051) 9

ERWIN CHEMERINSKY, FEDERAL JURISDICTION 663 (1989) 5

Fed. R. Civ. P. 1 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-42

ROSS MIDDLEMIST, *et al.*,
Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, BRUCE BABBITT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR LAKE COUNTY, MONTANA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amicus curiae Lake County, through its respective law officer, respectfully submits this brief pursuant to S. Ct. R. 37.5 in support of the petition for writ of certiorari.

INTEREST OF *AMICUS CURIAE*

The concern that prompts the filing of this *amicus curiae* brief can be simply stated. Much of the land today within Lake County, Montana, was at one time within the original Flathead Reservation. By Act of April 23, 1904, 33 Stat. 302 (Am. App. 1a-7a), some lands of the Reservation were allotted to individual Indians, and the unallotted lands opened to public settlement and entry.

(Approximately one million acres were opened in this manner on May 2, 1910, pursuant to the Presidential Proclamation of May 22, 1909, 36 Stat. 2494). As a result, only about half the original acreage of the Flathead Reservation is still held in trust for tribes or tribal members, and the remainder is held in fee, primarily by non-members (more than three-fourths of the population is non-members).

In short, the demographics of Lake County are not unlike those recently set forth in this Court in *Hagen v. Utah*, —— U.S. ——, 114 S. Ct. 958, 970 (1994). Because Lake County has already labored under the serious "burdens" noted in *Hagen* for over a decade, (*Hagen* at 970), the decision of the Court of Appeals promises to now almost effectively preclude the orderly administration of local government.

In this instance, the extent of the problem for any unit of local government is generally made clear in the tribal notice:

> Private individuals; Corporations, Local, County, State, Tribal and Federal Government Agencies who are going to be doing *any* type of construction work on or near *any* natural streams, rivers, lakes, or wetlands within the Flathead Reservation must submit an application and obtain an approved permit before any disturbance of the bed and banks of these waterways occurs.

Pet. App. A-47, *Middlemist v. Sec. of the U.S. Dept. of Interior*, 19 F.3d 1318 (9th Cir. 1994) *petition for cert. filed*, (U.S. July 5, 1994) (No. 94-42) (emphasis added).

Other ordinances, just as sweeping in scope, related and unrelated, are being passed and federally approved on a regular basis on this and other Indian reservations across the country—and nearly all are premised upon an assertion of substantial tribal jurisdiction over non-members and other non-tribal entities. As a result, routine activity

of all sorts that would have been undertaken and completed as a matter of course a year ago, has been deferred, placed on hold or, in many instances, simply cancelled (general development, roadwork, bridges, and so forth).

Threats of complex litigation are never enthusiastically received by the average citizen. The predictable response of doing nothing usually seems preferable. In most instances, it is at least the more affordable option. But for those who cannot wait and who still trust the federal courts "to secure the just, speedy, and inexpensive determination of every action" (Fed. R. Civ. P. 1), the choice here is misleading in the extreme. If everyone must now sue or be sued in a non-representative forum before federal claims for relief will be granted (or even entertained), when substantial rights or liberties are at stake in myriad fact situations, local government cannot even plan or promise to fulfill duties and obligations reasonably expected. In the absence of some specific Congressional directive, nothing in *National Farmers Union Insurance Company v. Crow Tribe of Indians*, 471 U.S. 845 (1985) or *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987) requires such an unworkable and unjust federal mandate.

SUMMARY OF ARGUMENT

The principles of comity and judicial economy animating *National Farmers Union* and *Iowa Mutual* have no application in the absence of litigation pending in tribal court. The text of both *National Farmers Union* and *Iowa Mutual* undermines any notion that pending litigation is not an absolute prerequisite to the application of the doctrine.

ARGUMENT

I. *NATIONAL FARMERS UNION* AND *IOWA MUTUAL* HAVE NO APPLICATION IN THE ABSENCE OF LITIGATION PENDING IN TRIBAL COURT.

It is undisputed that *National Farmers Union* and *Iowa Mutual* are premised on the fact that litigation was pending in tribal court at the time that federal actions were commenced. Even the "questions presented" to this Court by the United States were structured in terms of a "claim pending" and a request to "enjoin" tribal proceedings. Brief for the United States as *Amicus Curiae* Supporting Respondents, *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987) (No. 85-1589); Brief for the United States as *Amicus Curiae* Supporting Respondents, *National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845 (1985) (No. 84-320). Nothing in the text of the opinions can fairly be cited to support or even indicate a more expansive reading was intended or permissible. Here, the district court simply thought general policy reasons and precedent in the circuit justified such a result. *Middlemist v. Secretary of the U.S. Dept. of Interior,* 824 F. Supp. 940, 944 (D. Mont. 1993). Evidently the Court of Appeals agreed and other circuits have also adopted this view without detailed analysis. *Duncan Energy Co. v. The Three Affiliated Tribes,* 27 F.3d 1294 (8th Cir. 1994) (Beam, J. at 1300 and Loken, J. concurring at 1303). Importantly, the text of both *National Farmers Union* and *Iowa Mutual* actually undermines any notion that pending litigation is not an absolute prerequisite to the application of the doctrine.

First, *National Farmers Union* cites *Juidice v. Vail,* 430 U.S. 327 (1977), in setting forth the delimiting principles of the abstention doctrine established in *Younger v. Harris,* 401 U.S. 38 (1971). *National Farmers Union,* 471 U.S. at 856 n.21. This narrowly tailored doctrine makes no sense in the absence of other pending litigation. Indeed, even the suggestion has been rejected for decades:

> [I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a state court *could* entertain it.

Alabama Pub. Serv. Comm'n v. Southern R.R. Co., 341 U.S. 341, 361 (1951) (emphasis added).

Secondly, the concurring and dissenting Opinion in *Iowa Mutual* (by the author of the opinion in *National Farmers Union*), defines this understanding *exclusively* in terms of pending litigation. *Iowa Mutual*, 480 U.S. at 20 (Stevens, J. concurring and dissenting). (Of course, we recognize that the absence of pending litigation was not actually an issue in *Iowa Mutual*—almost by definition).

Thirdly, Justice Marshall in *Iowa Mutual* referenced the initial issue in the context of pending litigation when he explicitly stated:

> [T]he rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

Id. at 16 n.8. *See also, Brief* for the United States, *Iowa Mutual* at 1-2, 21-22, (citing *Colorado River*).

There is absolutely no question that *Colorado River* abstention is expressly premised on pending litigation. Nor is there any doubt that such a principle can be simply ignored for other perceived public policy purposes. In fact, it is generally recognized that the opposite is the case:

> The Supreme Court, however, in two major decisions—*Colorado River Water Conservation District v. United States* and *Moses H. Cone Memorial Hospital v. Mercury Construction Co.* declared that such abstention is appropriate *only in very limited, exceptional circumstances.*

ERWIN CHEMERINSKY, FEDERAL JURISDICTION 663 (1989) (emphasis added).

Moreover, other circuits at least recognize the importance of this aspect of the exhaustion issue ("most serious") and indeed, even cite *Colorado River* generally. *Duncan Energy Co.*, (Loken, J. concurring at 1303). And finally, other recent cases recognize the importance of the doctrine generally and have decided to proceed more cautiously on a case by case determination. *See generally, Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812-815, (7th Cir. 1993), and *Texaco Inc. v. Zah*, 5 F.3d 1374, 1376-1378 (10th Cir. 1993):

> [W]e must depend upon the district courts to examine assiduously the *National Farmers* factors in determining whether comity requires the parties to exhaust their tribal remedies before presenting their dispute to the federal courts. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814-15 (7th Cir. 1993) (noting that the propriety of tribal exhaustion depends upon a case by case examination of the comity factors).

Id. at 1378.

Nevertheless, the fact remains that in most circuits the pending litigation issue was almost summarily dismissed early on without reference to these principles. As a result, the prospect of correcting this misconstruction, already precedent in several circuits, is not likely. In the absence of some authoritative interpretation of this Court's opinions by this Court, even if a conflict among the circuits should later arise, it is not likely to shed further light on what this Court intended in *National Farmers Union* and *Iowa Mutual*. For this reason, at this point in time only this Court can authoritatively resolve the issue and the petition for certiorari should be granted now to avoid further unnecessary delay and uncertainty.[1]

---

[1] Other reasons are set forth in the Brief of *Amici Curiae* States, submitted in support of the petition.

Although *amicus* does not doubt that the views of the United States (not yet submitted to this Court) could lend substantial credence and support to the petition at least in this important respect, such a submission is most unlikely. Almost certainly, the United States, at best, will alternatively conclude, for some reason, that there will be time enough another day for this Court to act. In this instance, the views of the United States are an important part of the problem, as the following argument attests.

II. THE VIEWS OF THE UNITED STATES SHOULD BE ASSESSED IN THE LIGHT OF THEIR PREVIOUS ARGUMENTS.

A. The United States told the Court of Appeals in no uncertain terms "Nothing in the language of the leading Supreme Court cases requires an ongoing tribal proceeding." Brief for Federal Appellees at 10, *Middlemist v. Secretary of the U.S. Dept. of Interior*, 19 F.3d 1318 (9th Cir. 1994) (No. 93-35315). Importantly, the United States neglected to point out that in those same cases, the United States told this Court a somewhat different story. Brief for the United States, *National Farmers Union*, Brief for the United States, *Iowa Mutual*. In fact, as noted above, in both instances the United States even structured the "questions presented" in terms of a "claim pending" and a request to "enjoin" tribal proceedings. Brief for the United States, *Iowa Mutual*; Brief for the United States, *National Farmers Union*. And, after *National Farmers Union* had been decided, the United States in *Iowa Mutual* stressed that the *Iowa Mutual* dispute was also "already the subject of a *suit pending* in tribal court" Brief for the United States at 2-3 (emphasis added), and emphasized that the federal suit:

> [C]oncerns precisely the same events and raises precisely the same issues as the *case pending* in the Blackfeet tribal court . . .

Id. at 7 (emphasis added).

Nevertheless, according to the United States, for some unstated reason, "nothing in the language" of the cases reflects this position.

The United States did not offer the Court of Appeals any explanation for this rather anomalous argument: namely, that both opinions generally adopt the position of the United States, but on this substantial point there was no reliance on the questions presented or the arguments submitted in support thereof.

Secondly, the United States also neglected to point out that a fair reading of *National Farmers Union* and *Iowa Mutual* could actually support the opposite conclusion. At least that should be the inference from the argument the United States submitted in *U.S. v. Plainbull*, 957 F.2d 724 (9th Cir. 1992). According to that Court:

> The *Government* also suggests that the district court abused its discretion by abstaining from the merits of this case because there was *no concurrent action pending* in the tribal courts.

Id. at 728. (emphasis added).

If "nothing in the language of the leading Supreme Court cases requires an ongoing tribal proceeding," the United States should explain their argument to the contrary. At the very least, if this argument is no longer persuasive, some decision of this Court should be cited in support of that proposition.

Of course, this is not to say that the United States (or any advocate) is not free to change its position or legal argument. However, the reasons that prompt the change are important. Here the point is especially telling and it has nothing to do with the principles of a subsequent decision of this Court.

The short of the matter is that in recent years, the United States has routinely and zealously supported tribal

territorial sovereignty over non-Indians in almost every instance imaginable. Since 1978, for example, see, Memorandum for the United States, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (No. 76-5729), (arguing in support of tribal hunting and fishing jurisdiction over non-Indians); Brief for the United States, *Montana v. United States*, 450 U.S. 544 (1981) (No. 79-1128), (arguing in support of tribal hunting and fishing jurisdiction over non-Indians on fee lands); Brief for the United States, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546), (arguing in support of tribal criminal jurisdiction over non-member Indians); Brief for the United States, *South Dakota v. Bourland*, —— U.S. ——, 113 S.Ct. 2309 (1993) (No. 91-2051), (arguing in support of tribal hunting and fishing jurisdiction over non-Indians on fee lands owned by the United States).

Moreover, in almost every instance the arguments of the United States have been rejected by this Court and correctly so. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Duro v. Reina*, 495 U.S. 676 (1990); *South Dakota v. Bourland*, —— U.S. ——, 113 S.Ct. 2309 (1993). Undeterred, the United States then reads the rejection as narrowly as possible and simply marches on in support of tribal territorial sovereignty over non-members in renewed litigation as if the issue had not been authoritatively resolved. As a result, whatever deference might ordinarily be accorded the views of the United States in other federal litigation, is simply lacking here because of this strained though consistent "litigating position" in support of Indian Tribes. *South Dakota v. Bourland* at 2321.

As a practical matter, another factor compounds the problem presented by this type of seemingly relentless advocacy. At the same time, the United States, through its constituent agencies (presumably pursuant to Department of Justice advice), continues to approve tribal ordi-

nances claiming sweeping jurisdiction over non-Indians, in spite of the decisions of this Court. No doubt, the United States believes that this double barreled approach somehow advances a worthy cause. But the fact remains that these are now issues only Congress should decide. *Montana, Brendale, Duro* and *Bourland* reflect the controlling doctrine of this Court.

Nothing in *National Farmers Union and Iowa Mutual* requires the unworkable and unjust federal mandate in this case. It is too late in the day for the United States to really expect any other argument to be credible.

B. Part of the confusion on this issue stems from a related argument that does come directly from *Iowa Mutual*: the extent to which some courts have been unduly influenced in ordering exhaustion by the *Iowa Mutual dicta* once indicating tribal governments presumptively possess civil jurisdiction over non-Indians on fee land. (Not coincidently, the source of this argument can also be found in the submission of the United States. Brief for the United States, *Iowa Mutual*). At the time, this "presumption" conflicted squarely with the rationale and holding of *Montana v. United States, supra.* Since, it has been squarely rejected as "misplaced" in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 427 n.10 (1989) and refuted by the holding there, as well as the holding in *Bourland* ("*Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others." "[T]he reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' 450 U.S., at 564, 101 S.Ct., at 1258, and is therefore *not* inherent." *Bourland* at 2316, 2320 n.15 (emphasis as in original). *See also* the "very narrow powers" men-

tioned in *County of Yakima, et al. v. Confederated Tribes and Bands of the Yakima Indian Nation*, —— U.S. ——, 112 S.Ct. 683, 692 (1992) and the "[A]ll the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system" conclusion in *Duro* at 694.[2]

Nevertheless, the thought continues to find its way into many exhaustion opinions. In fact, the district court in the instant case placed specific reliance on this very sentence. *Middlemist v. Sec. of the U.S. Dept. of Interior*, 824 F. Supp. 940, 946 (D. Mont. 1993). And, as recently as this summer, the Court of Appeals for the Eighth Circuit cited the same presumption. *Duncan Energy* at 1299.

National Farmers Union and *Iowa Mutual* certainly should not be viewed in this light and if clarification is needed to finally put this issue to rest, this case could be the means by which that point is made. If one assumes that a citation to the presumption with approval evidences some indication of misplaced reliance, the extent of the problem is readily referenced. *See, e.g., Blaze Construc-*

---

[2] The United States evidently still disagrees. The same presumption in support of a related argument was called to the attention of the Court of Appeals:

> See *Iowa Mutual*, 480 U.S. at 18 (civil jurisdiction over activities of non-Indians implicating the rights of Indians on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute").

Brief for Federal Appellees, *Middlemist* at 15.

Moreover, according to the United States "*Brendale* itself illustrates the deep fissures within the Court concerning the nature and scope of tribal government power" and *Bourland* simply "turned on a detailed statutory analysis." Brief for Federal Appellees, *Middlemist* at 17, 18. (The "very narrow powers" mentioned in *Yakima* at 692 and *Duro's* "all the more reason to reject" conclusion were not addressed.)

tion Inc. v. U.S., 27 Fed. Cl. 646, 654 (1993); *Brown v. Washoe Housing Authority*, 835 F.2d 1327, 1329 (10th Cir. 1988); *Burlington Northern Railroad Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991); *Sanders v. Robinson*, 864 F.2d 630, 632-33 (9th Cir. 1988); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991); *Snowbird Construction Co., Inc. v. U.S.*, 666 F. Supp. 1437, 1443 (D. Idaho 1987); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989); *Stock West Corp. v. Taylor*, 737 F. Supp. 601, 603-04 (D. Or. 1990); *Stock West Corp. v. Taylor*, 964 F.2d 912, 922 (9th Cir. 1992); *Tom's Amusement Co., Inc. v. Cuthbertson*, 816 F. Supp. 403, 406 (W.D.N.C. 1993); *Twin City Construction Co. of Fargo v. Turtle Mountain Band of Chippewas*, 866 F.2d 971, 972 (8th Cir. 1989); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577, 578 (9th Cir. 1987).[3]

---

[3] One final point should be mentioned. In 1982, the Court of Appeals addressed the status of this general area and several issues in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982). A concise summary of the case is presented in the dissenting views on denial of certiorari. *Id.* at 977-981. (Rehnquist, J., with whom White, J. joined, dissenting).

With respect to the disestablishment issue, at the time the dissent noted that *Namen* appeared to be based on principles derived from cases from this Court. As a result, that question did not then warrant review. *Id.* *Namen* was subsequently cited as persuasive authority throughout the circuits on this issue. For example, it was repeatedly relied on by the parties, the United States, and the opinions in support of continued reservation status (incorrectly) in the *Ute Indian Tribe v. State of Utah* litigation. *Ute Indian Tribe v. State of Utah*, 716 F.2d 1298 (10th Cir. 1983), 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), *rev'd in part, sub nom. Hagen v. Utah*, —— U.S. ——, 114 S.Ct. 958 (1994). (The contrast between *Namen* and *Hagen* in other respects is significant, but beyond the scope of this note).

The issues directly addressed in the dissent ("ownership" and "regulatory") have since been generally revisited in other cases. These cases support the views expressed in the dissent. *Utah*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

LARRY NISTLER
Lake County Attorney
106 4th Avenue East
Polson, Montana 59860
(406) 883-6211

TOM D. TOBIN *
TOBIN LAW OFFICES, P.C.
P.O. Box 730
422 Main Street
Winner, South Dakota 57580-0730
(605) 842-2500

* *Counsel of Record*

October 7, 1994

Div. of State Lands v. United States, 482 U.S. 193, 198 (1987), *United States v. Cherokee Nation*, 480 U.S. 700, 706 (1987); *Brendale, Bourland.*

APPENDIX

BEST AVAILABLE COPY

APPENDIX

Act of April 23, 1904 (33 stat. 302)

CHAP. 1495.—An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and headmen, and delegates of the confederated tribes of the superintendent of Indian affairs for the Territory of Washington, on the part of the ~~Un~~ited States, and the chiefs, Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to

inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners shall be a United States special Indian agent inspector of the Interior Department.

SEC. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salary of not more than eight dollars per day while so actually employed, with such assistants as may be necessary, at a salary not to exceed six dollars

per day while so actually employed. Mineral lands shall not be appraised as to value.

SEC. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall be paid a salary of not to exceed ten dollars per day each while employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person

shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish Wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.[1]

---

[1] 41 L.D., 521.

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided*, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

SEC. 11. That all said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

SEC. 12.[2] That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for Catholic mission schools, church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, the said lands to be granted in the following amounts, namely, to the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditions and for similar purposes for any other

[2] A substitute for sec. 12 was enacted in sec. 9 of the act of 1905, ch. 1479, 33 Stat., 1080, post, p. 157.

missionary or religious societies that may make application therefor within one year after the passage of this act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations, mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

SEC. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisible for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reser-

vation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

SEC. 15. That there is hereby appropriated out of the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school, and mission purposes, as provided in sections eight and twelve of this act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this act.

SEC. 16. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

Approved, April 23, 1904.